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Supreme Court, U.S.
FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.

ROBERT M. KURUCZA
STEVEN S. ROSENTHAL*
ROBERT G. BALLEN
LESLIE J. CLOUTIER
MORRISON & FOERSTER
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Counsel for NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc.

**Counsel of Record*

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10 pp

TABLE OF CONTENTS

	Page
REPLY BRIEF FOR PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.	1
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	Page(s)
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	6
Independent Bankers Ass'n v. Heimann, 613 F.2d 1164 (D.C. 1979), *cert. denied*, 449 U.S. 823 (1980)	3,4
Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010 (5th Cir. 1968)	4
SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959)	5
Statutes	
12 U.S.C. 24(7)	*passim*
12 U.S.C. 92	*passim*
Glass-Steagall Act, 48 Stat. 184, now codified as part of 12 U.S.C. 24(7)	2
Other Authorities	
OCC Ltr. No. 331 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,501 (Apr. 4, 1985)	2

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NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc. (collectively "NationsBank") demonstrated in their petition, as the rehearing dissent found, that the court of appeals "badly erred" in applying the *Chevron* doctrine and in interpreting the National Bank Act ("NBA"), and that this error has serious adverse consequences for the banking industry and the consumers it serves. Respondent Variable Annuity Life Insurance Co.

("VALIC"), in its opposition, offers up a smorgasbord of arguments in a strained attempt to dissuade this Court from reviewing this case. Each of VALIC's arguments is amply addressed in the petitions of NationsBank and the Government, as well as the supporting amici briefs.[1] However, several of these arguments merit further response, particularly in view of certain mischaracterizations by VALIC.

1. VALIC states that in 1978 "the Comptroller ruled that a national bank's proposal to broker annuity contracts" violated 12 U.S.C. 92. Opp. at 4. This statement seriously mischaracterizes what was an informal, unpublished letter of a junior staff member stating "my opinion [of] an arrangement of the kind that you describe . . . ." Opp. App. 1a. No formal Comptroller's ruling occurred in 1978. Accordingly, the Comptroller's Approval in this case, NationsBank Pet. App. D, is not a "revers[al]" of a "previous interpretation" of a formal agency position. Opp. at 12. Rather, it is the first formal approval by the Comptroller construing relevant statutory provisions in response to a request by an operating subsidiary of a national bank for authorization to broker both fixed *and* variable annuities.[2] VALIC is, thus, incorrect in its contention that the Comptroller's Approval

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[1] The brief filed by the American Bankers Association, *et al.*, is referred to herein as "Am. Bankers Amici Br." and the brief filed by the Conference of State Bank Supervisors, *et al.*, is referred to herein as "State Bank Amici Br."

[2] National banks were previously permitted to broker variable annuities under Section 16 of the Glass-Steagall Act, 48 Stat. 184, now codified as part of 12 U.S.C. 24(7). *See* OCC Ltr. No. 331 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,501 (Apr. 4, 1985).

is inconsistent with a previously-held formal agency position. Opp. at 12-13.

2. VALIC contends that petitioners "totally ignore" the court of appeals' "holding" that the sale of annuities "is beyond a bank's powers under [the incidental powers clause of Section] 24(7)." Opp. at 8, 17. This contention again is without a factual basis. It inexplicably ignores the multi-page analyses in the petitions of NationsBank and the Government addressing the court of appeals' failure to defer to the Comptroller's reasonable interpretation of the "incidental" powers clause of Section 24(7) as authorizing the brokerage of fixed and variable annuities. NationsBank Pet. at 17-20; Gov't. Pet. at 14-17. In any event, the Government appropriately questions whether the court of appeals' statements on the "incidental" powers clause should even be viewed as an independent holding. Assuming that such statements should be considered an independent holding, the court of appeals' construction of the clause, as the Government correctly stated, is "unduly crabbed" and in conflict with controlling case law. Gov't. Pet. at 15 n.7. *See also* Am. Bankers Amici Br. at 4-7; State Bank Amici Br. at 8-10.

3. Respondent also asserts that "[t]here is no conflict" with *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C. 1979), *cert. denied*, 449 U.S. 823 (1980). Opp. at 14. This assertion is disingenuous and completely misstates the holding of *Heimann*. There is no denying that a square conflict exists. First, there is a conflict as to whether Section 92 is a limit on, or grant of, additional national bank powers. Although respondent characterizes the *Heimann* holding that Section 92 is a grant of additional power as

"dicta," the decision does not support this characterization; nor do subsequent precedent. Am. Bankers Amici Br. at 9. Second, the court of appeals expressly rejected the argument that *Heimann* limits the *Saxon* decision[3] to only "broad forms" of insurance, finding that Section 92 absolutely prohibits a national bank from acting as agent for "any fire, life *or other insurance* company." NationsBank Pet. App. 13a (emphasis in original). Since *Heimann* recognizes an exemption from this prohibition for at least certain types of specialized insurance-related products and the Fifth Circuit does not, a conflict clearly exists.

Indeed, VALIC concedes, as it must, that the D.C. Circuit in *Heimann* held that under the "incidental" powers clause national banks have the authority to sell credit life insurance to their borrowers. Opp. at 14-15. Despite the D.C. Circuit's characterization of this as "a limited special type of coverage," *Heimann*, 613 F.2d at 1170, a national bank, in order to sell credit life insurance to its customers, must act as an agent for a life insurance company. The *Heimann* decision is, therefore, in direct conflict with the decision below on an issue VALIC identifies as essential to its position.

Tellingly, VALIC attempts in its opposition to selectively distinguish credit life insurance from annuities based on a functional analysis, which leads VALIC itself to the conclusion that such insurance is more akin to a banking product than insurance. Opp. at 15. NationsBank agrees, of course, with a functional analysis approach. This was exactly the ap-

[3] *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968).

proach the Comptroller used in finding that annuities are, in substance, financial investment products that national banks and their subsidiaries are empowered to sell as brokers. NationsBank Pet. App. 38a-41a.

4. VALIC's defense of the court of appeals' construction of Section 92 is largely predicated on its argument that annuities are "insurance" under the banking laws because "all fifty states regulate annuity contracts under their insurance laws." Opp. at 13. However, in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), this Court squarely rejected VALIC's argument, stating as follows: "[H]ow the States may have ruled is not decisive. For, as we have said, the meaning of 'insurance' or 'annuity' under these Federal Acts is a federal question." *Id.* at 69. In fact, VALIC invoked this same flawed reasoning in its earlier case, claiming that the manner in which the States regulated annuities should be dispositive of the meaning of "insurance" and "annuity" under a federal statute. In this case, the Comptroller provided extensive reasons for concluding that annuities are not insurance under Section 92. NationsBank Pet. App. 43a-47a. Since the court of appeals (at the urging of VALIC) rejected those reasons in large part because annuities are treated as "insurance" under state regulatory laws, NationsBank Pet. App. 11a, its decision presents a conflict with *SEC v. VALIC* that requires resolution by this Court.[4]

[4] VALIC seeks to avoid the implications of its previous loss by attempting to limit the reach of the 1959 decision to variable annuity contracts which are (along with fixed annuities) again at issue in this case. This position itself inherently concedes the existence of a conflict on this point.

5. The court of appeals erroneously resolved the issue of whether annuities are insurance at the first step of the *Chevron* analysis, finding that Section 92 was clear on its face on this issue.[5] NationsBank Pet. App. 10a. The court of appeals was wrong for the simple and compelling reason identified in the rehearing dissent: "Section 92 nowhere defines 'insurance.'" NationsBank Pet. App. 24a. Under *Chevron*, this "should leave it to the Comptroller to arrive at a reasonable definition . . . ." *Id.*

6. Finally, VALIC maintains that the decision below will not have substantial adverse financial implications for national banks. This is simply not true. VALIC states that "[m]ost of those sales are conducted through state-chartered banks, bank subsidiaries, or third-party arrangements with national banks." Opp. at 15-16. First, this case involves a national bank subsidiary. Second, as the amici briefs show, most of the states have wild card or parity statutes that put state-chartered banks on a par with national banks and, therefore, the decision below directly affects sales of annuities by state-chartered banks and their subsidiaries, as well as national banks and their operating subsidiaries.[6] Thus, without question, annuity sales by banking organizations clearly are adversely affected by the court of appeals' decision. As a result, there is no doubt that the court of

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[5] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[6] *See* State Bank Amici Br. at 4, 7-8; Am. Bankers Amici Br. at 18-20 & App. 1-2. In fact, the very number of participating amici is a testament to the impact of this case.

appeals' decision significantly impairs the ability of banks, particularly national banks and their subsidiaries, to compete in the financial services marketplace.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. KURUCZA
STEVEN S. ROSENTHAL*
ROBERT G. BALLEN
LESLIE J. CLOUTIER
MORRISON & FOERSTER
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Counsel for NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc.

**Counsel of Record*

Dated: May 25, 1994